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May 16, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17105-3265

RE: Implementation of Act 40 of 2017; Docket No. M-2017-2631527

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Cypress Creek Renewables, LLC's Petition for a Stay or Supersedeas of the Commission's Final Implementation Order Entered May 3, 2018, in the above-referenced matter. Copies are being served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please contact me at your convenience.

Sincerely,

pp: 

Daniel Clearfield

DC/jls
Enclosure

cc: Certificate of Service (w/enc)

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Cypress Creek Renewables, LLC's Petition for a Stay or Supersedeas of the Commission's Final Implementation Order upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

VIA EMAIL AND/OR FIRST CLASS MAIL

Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265

Lauren M. Burge, Esquire
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Assistant Small Business Advocate
Office of Small Business Advocate
300 North Second St., Suite 202
Harrisburg, PA 17101

Date: May 16, 2018



Daniel Clearfield

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Act 40 of 2017

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Docket No. M-2017-2631527

**PETITION OF CYPRESS CREEK RENEWABLES, LLC FOR A STAY
OR SUPERSEDEAS OF THE COMMISSION'S FINAL
IMPLEMENTATION ORDER ENTERED MAY 3, 2018**

Cypress Creek Renewables, LLC and its affiliates (collectively "Cypress Creek"), pursuant to 52 Pa. Code § 5.572, hereby request that the Pennsylvania Public Utility Commission ("Commission") expeditiously grant a stay or supersedeas of the "retagging" provisions of its Final Implementation Order ("FIO") entered May 3, 2018 in this proceeding, pending resolution of Cypress Creek's Petition for Clarification or Reconsideration ("Clarification Petition") filed concurrently with this Petition for Stay and the completion of the contract Commission review process established in the FIO.

Shortly after the issuance of the FIO, all renewable energy credits ("RECs") generated by out-of-state solar photovoltaic ("Solar PV") systems including those generated by Cypress Creek affiliated company systems,¹ which previously has been certified as AEPS Tier I Solar Photovoltaic Alternative Energy Credits ("PA SRECSs"), were retagged as "Tier I RECS" without regard to the petition process established by the Commission in its FIO.² Petitions to qualify credits under the grandfathering provision of Act 40 of 2017 that allows out-of-state facilities to maintain their existing AEPS Tier I Solar Photovoltaic certification until their current

¹ Barnhill Road Solar, LLC; Battleboro Farm, LLC; Downs Farm Solar, LLC; Green Farm Solar, LLC; Hardison Farm Solar, LLC; Leggett Solar, LLC; Modlin Farm Solar, LLC; Simons Farm Solar, LLC; SolNCPower1, LLC; SolNCPower2, LLC.

² *Implementation of Act 40 of 2017*, Docket No. M-2017-2631527, Secretarial Letter dated May 16, 2018, at 2.

contract expires (“Grandfathering Provision”) are due by July 2, 2018. Thereafter, the Commission will certify those out-of-state RECs that remain qualified as PA SRECs under the Grandfathering Provision until the end of the term of the applicable pre-existing contract. Only at the end of this process, if a contract is deemed not to comply with the Grandfathering Provision, should previously certified PA SRECs be retagged.³

The premature and unwarranted retagging of all out-of-state PA SRECs diminishes the value of those credits and puts into jeopardy Cypress Creek’s existing contracts which could cause serious economic harm to Cypress Creek. Consequently, Cypress Creek requests that the Commission expeditiously issue an order staying the retagging directives in the FIO and reinstating them as PA SRECs, until resolution of Cypress Creek’s Petition and the Commission’s contract review process.

As set forth herein, Cypress Creek fully satisfies the Commission’s requirements for a stay or supersedeas, which the Commission issues to avoid irreparable harm to a party pending final resolution of a matter either by the Commission or on appeal. In support of its request, Cypress Creek states as follows:

I. BACKGROUND

1. A more detailed background of this proceeding and the Commission’s FIO are set forth in Cypress Creek’s Petition for Clarification or Reconsideration, which is incorporated herein by reference. Cypress Creek provides the following additional information to facilitate the Commission’s resolution of this Petition for Stay.

³ It is important that proper classification of RECs be reflected in the Generation Attribute Tracking System (“GATS”) operated by PJM Environmental Information Services Inc. (“PJM-EIS”) as that is the “universal” registry utilized to track generation, ownership and retirement of alternative energy credits.

2. Cypress Creek is a leading national developer of Solar PV systems that are owned by Cypress Creek affiliates. Cypress Creek affiliates own out-of-state Solar PV systems that were certified as AEPS Tier I Solar prior to the effective date of Act 40 and had entered into contracts for the sale of PA SRECs generated by those systems prior to the effective date.

3. The FIO purports to provide policy guidance with respect to the implementation of Section 11.1 of Act 40 of 2017 (“Act 40” or the “Act”).

4. Act 40 of 2017 adds new provisions to the Administrative Code on the eligibility out-of-state solar photovoltaic (“Solar PV”) systems to generate renewable energy credits (“RECs”) that qualify for use as solar renewable alternative energy portfolio credits (“PA SRECs”).

5. Act 40 of 2017 contains a “Grandfathering Provision” which, by its express terms, applies to any: “binding written contract for the sale and purchase of alternative energy credits derived from solar photovoltaic energy sources entered into prior to the effective date of this section.”⁴

6. The FIO interprets the “Grandfathering Provision” more narrowly by stating that grandfathered contracts are those between **facilities** that are already certified as AEPS Tier I Solar Photovoltaic **and** “have entered into a contract with a Pennsylvania EDC or EGS serving Pennsylvania customers.”⁵ Cypress Creek’s Petition for Clarification or Reconsideration requests the Commission to clarify that the Grandfathering Provision is applicable to any

⁴ 71 P.S. § 714.

⁵ Final Implementation Order at 27.

existing, binding contract for the sale and purchase of PA-certified SRECs, not just those between a solar facility and an EGS, an EDC, or a similar entity.

7. The Commission instructed that those seeking to qualify credits under the Grandfathering Provision must file a petition within 60 days of the entry of its FIO (by July 2, 2018). The Commission indicated that it would subsequently provide procedures for the contract petition/approval process for facilities to maintain their certification.⁶

8. The Commission's FIO was entered on May 3, 2018. It does not specifically direct that out-of-state SRECs be retagged prior to the conclusion of the aforementioned petition process.

9. Nonetheless, effective May 8, 2018, and presumably in purported compliance with the FIO, PJM-GATS retagged all RECs generated by out-of-state Solar PV systems,,

⁶ Final Implementation Order at 32. Earlier today, a Secretarial Letter was issued that sets forth the information and supporting documentation that EDCs or EGSs should provide in their petitions to assist the Commission in determining which alternative energy credits are eligible to be used by the EDC or EGS to meet the AEPS Act solar PV share requirements. *Implementation of Act 40 of 2017*, Docket No. M-2017-2631527, Secretarial Letter dated May 16, 2018, at 1-2. The Secretarial Letter reaffirms the Commission's interpretation of the "Grandfathering Provision" as presented in the FIO — that grandfathered contracts are those between facilities that are already certified as AEPS Tier I Solar Photovoltaic and "have entered into a contract with a Pennsylvania EDC or EGS serving Pennsylvania customers." *Id.* at 1. However, the Secretarial Letter clarifies the FIO's interpretation and provides that "[c]ontracts may include those directly entered into between an out-of-state certified Tier I solar facility and an EDC or EGS; and/or a trail of contracts between an out-of-state certified Tier I solar facility, one or more intermediaries such as but not limited to wholesale default service participants or solar AEC aggregators, and an EDC or EGS which directly exhibits that a committed quantity of solar AEC output from the certified generation facility is being utilized to facilitate an EDC's or EGS's Tier I solar Alternative Energy Portfolio Standards obligations." *Id.* at 2, n. 3. While this clarification helpfully recognizes the central role of middle marketers in the sale and purchase of PA SRECs, it still does not comport with the clear and unambiguous language of the Grandfathering Provision Act or resolve the adverse impact to Cypress Creek and other similarly situated parties. The clear language of Subsection 2804(2)(ii) of the Act states that an AEPS certification must remain valid for a Solar PV system that had contracted to sell PA SRECs prior to the Effective Date of the Act. The Act does not limit the Grandfathering Provision to contracts directly between an EDC/EGS and a generator or a "trail of contracts" between those entities through a middle marketer. It is common for the system owner to have entered into a binding written contract to sell all of its PA SREC output to a middle marketer for a defined period of time without that party necessarily having yet in turn contracted for the resale of such PA SRECs to an EDC or EGS. Thus, the Commission's clarified interpretation still impairs the value of existing contracts in a manner not consistent with the clear language of the Act or with constitutional principles of contract protection and equal protection of the laws.

including those generated by Cypress Creek's affiliated companies, as only eligible as non-solar Tier I RECs. The out-of-state facilities' PA SRECs were retagged retroactive to November 2017.

10. Cypress Creek believes, and therefore avers, that the retagging of out-of-state RECs resulted from the AEC Program Administrator directing PJM-GATS to take this action and that the action was authorized or approved by the Commission, despite the fact that the FIO does not direct this action in this way.

11. The premature retagging of RECs impacts the prior and current classification of those credits even though the Commission's FIO creates a process by which entities could seek review of contracts and maintain their current PA SREC classifications until their current contract expires.

12. Pursuant to the FIO, the Commission is to determine, on a case-by-case basis as appropriate contracts are submitted, whether the contract will be able to qualify for SREC compliance pursuant to the Grandfathering Provision. While the Commission has not yet detailed what data petitioning entities are to provide to the Commission so it may make a determination on whether RECs generated by an out-of-state facility may be grandfathered, the premature retagging of credits has negative implications, including diminishing the value of the credits and threatening the termination of contracts.

13. PA SRECs typically trade at a much higher value than Tier I RECs. Thus the action of retagging all out-of-state RECs effectively downgraded an anticipated revenue stream contractually relied upon to finance solar systems.

14. As explained more fully below, the retagging of RECs also has implications for contracts requiring the delivery of PA SRECs. Since their RECs have been retagged, generators can no longer deliver the attribute required to satisfy the terms of their contracts.

II. STANDARDS FOR THE COMMISSION'S ISSUANCE OF A STAY

15. In determining whether to grant a stay or supersedeas, the Commission applies the criteria established by the *Pennsylvania Supreme Court in Pa. P.U.C. v. Process Gas Consumers Grp.*, 502 Pa. 545, 467 A.2d 805 (1983). *See, e.g., PPL Elec. Util. Corp. Universal Serv. and Energy Conservation Plan*, Docket No. 2010-2179796, 2011 Pa. PUC LEXIS 512 at 3-4 (Order entered December 1, 2011).

16. The grant of a stay is warranted if:

- (1) The petitioner makes a strong showing that it is likely to prevail on the merits.
- (2) The petitioner shows that without the requested relief it will suffer irreparable injury.
- (3) The issuance of a stay will not substantially harm other interested parties in the proceeding.
- (4) The issuance of a stay will not adversely affect the public interest.

Process Gas Consumers, 502 Pa. at 552-553, 467 A.2d at 808-09. The Court held that these criteria “[require] the Court to balance the interests of all parties, and the public where applicable, and [require] the applicant to demonstrate a probability of success on the merits.” *Process Gas Consumers*, 502 Pa. at 553, 467 A.2d at 809.

17. In adopting the requirements for a stay set forth in *Virginia Petroleum Jobbers Ass’n*, the Supreme Court acknowledged that the first prong of the four-part test is out of place where the request for stay is directed to the agency or court that issued the decision. Consistent with the foregoing directive, the Commission has held that the “likelihood to prevail on the merits” prong is “not applicable” to a request for a stay before the Commission. *Pa. PUC, et al.*

v. Pennsylvania Electric Company, et al., Docket No. M-2008-2036188, 2010 Pa. PUC LEXIS 248 (Order entered March 25, 2010); *Pa. P.U.C v. U.G.I. Corp.*, 57 Pa. P.U.C. 83, 88-89 (1983); *Accord Pa P. U C v. Nat'l Fuel Gas Dist. Co.*, 65 Pa. P.U.C. 210, 213 (1987); *Re General Elec.*, 59 Pa. P.U.C. 61, 63 (1984).

III. CYPRESS CREEK HAS DEMONSTRATED THAT THE CRITERIA FOR ISSUANCE OF A STAY ARE MET

A. The Absence of a Stay Pending the Commission's Decision on Cypress Creek's Petition and Contracts Will Cause Irreparable Injury

18. The Commission's first requirement for a stay is clearly satisfied by the uncertainty stemming from the Commission's retagging decision in the FIO and its impact on existing contracts in place.

19. Cypress Creek is a Solar PV company that, through its affiliates, owns eleven Solar PV systems outside of Pennsylvania with PA SREC contracts. Prior to the effective date of Act 40, all of those systems were certified as authorized suppliers of PA SRECs for use by parties with compliance obligations under the AEPS.

20. Prior to the effective date of Act 40, the Cypress Creek affiliate owners of those systems had entered into a limited number of long term contracts for the sale of these PA SRECs to brokers and other third-party entities. Those brokers either have or intend to enter into contracts for the sale of these PA SRECs to Pennsylvania load serving entities (EDCs, EGSs, etc.). The following shows the contracts and the remaining terms for the Cypress Creek contracts. These contracts deliver an average of 4,380 SRECs per month per contract:

**Cypress Creek
PA SREC Contracts**

	Number of Contracts	Time Left on Contracts
Counter Party 1	3	7.75 years
Counter Party 2	2	2 months
Counter Party 3	1	14 months
Counter Party 4	5	39 months

21. In light of the Commission’s retagging directives in the FIO and the retagging of SRECs before an opportunity is provided to demonstrate satisfaction of the “Grandfathering Provision” criteria, Cypress Creek’s RECs have been significantly reduced in value, as PA SRECS generally are more valuable than PA Tier I RECs,

22. The Commission’s retagging action also actually puts Cypress Creek’s contracts in jeopardy. For Cypress Creek, the only way to avoid contract termination at this point is if negotiations between contracting parties yield a mutually satisfactory result. The results of such negotiations cannot be determined at this time. Cypress Creek is thus in danger of having its contracts cancelled because of the Commission’s precipitous action, even if the contracts ultimately would have been determined to satisfy the Grandfathering Provision.

23. The potential for termination of contracts (eligible for grandfathering under Act 40) provides a basis for the Commission to grant a stay. Cypress Creek believes and therefore avers that it will suffer extensive harm if any of its contracts are terminated.

24. Cypress Creek notes that the Commission’s retagging will adversely affect all RECs generated by out-of-state solar systems, even those that strictly meet the description of contracts eligible for grandfathering (i.e., a contract between a solar facility and an EDC or EGS,

etc.) as set forth in the FIO. Those contracts could similarly be interfered with by the Commission's retagging.

25. Cypress Creek submits that the unwarranted and premature retagging of all out-of-state PA SRECs is not only unfair but also violates the due process rights of those who would have submitted petitions to qualify credits through the process established by the Commission in its FIO. The FIO set forth a process for entities to qualify their contractual obligations that arose prior to the implementation of Act 40 and to maintain the qualification of their credits. The AEC Program Administrator directing PJM-GATS to retag credits, without regard to the petition process in the FIO, deprived entities of notice and an opportunity to be heard. Consistent with the fundamental principles of due process,⁷ the Commission should grant a stay of the retagging provisions of the FIO pending the outcome of Cypress Creek's Petition for Clarification or Reconsideration of the FIO and refrain from directing retagging of out-of-state credits until the conclusion of its petition process.

B. Other Interested Parties Will Not be Substantially Harmed By the Issuance of the Requested Stay

26. The granting of this Petition will not harm any other party and will not frustrate the intent of Act 40 to "close the solar borders" by ensuring that only in-state AEPS certifications are grandfathered and that out-of-state Solar PV can maintain certification only until their current contracts expires.

⁷ Due process requires notice and a meaningful opportunity to be heard prior to the deprivation of a property interest. *See Popowsky v. PUC*, 805 A.2d 637 (Pa. Commw. Ct. 2002), appeals denied, 820 A.2d 163 (Pa. 2003) and 847 A.2d 60 (Pa. 2004); *Scott Paper Co. v. PUC*, 558 A.2d 914 (Pa. Commw. Ct. 1989). Only in "extraordinary situations" may notice and an opportunity to be heard be postponed until after the deprivation. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

27. If the Commission directs that the premature retagging of credits be reversed pending the conclusion of the petition process mandated by the FIO, the Commission will still be able to retag credits deemed ineligible under the “Grandfathering Provision” after the conclusion of the that process. Moreover, just as the May 8, 2018 retagging of out-of-state RECs was retroactive to November 2017, the Commission may instruct that credits ineligible under the “Grandfathering Provision” be retagged retroactive to November 2017 after it concludes its evaluation of petitions submitted to maintain AEPS Tier I Solar Photovoltaic certification.

C. Issuance of a Stay Will Not Adversely Affect the Public Interest

28. The final criterion for issuance of a stay requires the Commission to consider the public interest and whether it will be adversely affected if a stay is granted. Cypress Creek is entitled to seek clarification or reconsideration of the FIO as provided under the Commission’s regulations. The public has a general interest in having the issues raised in Cypress Creek’s Petition clarified.

29. Upon balancing the interests of all affected parties and the public interest, Cypress Creek urges the Commission to issue the requested stay. The Commission will be able to retroactively change the designation assigned to renewable energy credits, as it has done already, once facilities have been properly vetted through the “Grandfathering Provision” petition process. Only by granting a stay will irreparable harm be avoided and the public interest advanced while producing no substantial harm on any interested party.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Cypress Creek respectfully requests that the Commission:

(1) Expeditiously issue an order granting this Petition for Stay or Supersedeas in this proceeding staying the tagging directives of the May 3, 2018 Final Implementation Order pending the outcome of Cypress Creek's Petition for Clarification or Reconsideration of that Order;

(2) Direct that all out-of-state PA SRECs that were retagged as "Tier I RECS" on May 8, 2018, including those generated by Cypress Creek affiliated company facilities, be retagged as PA SRECs until the conclusion of the petition/approval process established by the Commission to qualify credits as falling under Act 40's Grandfathering Provision; and

(3) Grant any other relief consistent with this Petition deemed to be in the public interest.

Respectfully submitted,



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Dated: May 16, 2018

Counsel for Cypress Creek Renewables, LLC

VERIFICATION

I, Rebecca Goold, hereby state that I am an Asset Manager of Cypress Creek Renewables, LLC and am authorized to make this verification on its behalf, and that the facts above set forth in the attached Petition are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 9/16/18

Rebecca Goold